Evelyn Nesamani a/p Samuel Gunalan Peter v Lionel Sushil a/l Edward

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO 33–442–08 OF 2015
EVROL MARIETTE PETERS J
4 FEBRUARY 2023

Civil Procedure — Contempt of court — Committal proceedings — Parties obtained decree nisi — Petitioner was given custody, care and control of children — Respondent was given access to children — Petitioner fled to foreign country with children and denied respondent's right of access — Whether there was wilful refusal to comply with court's order — Whether custodial sentence warranted — Courts of Judicature Act 1964 s 13 — Federal Constitution art 126 — Rules of Court 2012 O 52 r 4

The respondent and the petitioner were husband and wife before they obtained a decree nisi in which the custody, care and control of their children were awarded to the petitioner whilst the respondent was granted access. Problem arose when the petitioner had acted contrary to the court's order by denying the respondent's right of access to the children. The petitioner had fled to New Zealand with the children and enrolled the children in a school in New Zealand without the respondent's knowledge. This led to the filing of the present application for contempt of court pursuant to O 52 r 4 of the Rules of Court 2012 ('encl 58'). The issues arose were: (a) whether there was wilful refusal to comply with the order — in respect of this issue, the petitioner contended that the respondent had failed to pay child maintenance, and as a result thereof, the petitioner had no choice but to find employment in New Zealand; and (b) whether a custodial sentence was warranted.

Held, allowing encl 58 with no order as to costs:

(1) The petitioner's contention bereft of merit for the main reason that maintenance and access were two separate issues, and access was never conditional upon maintenance. In any event, the respondent had averred that maintenance was not paid simply because he was unable to do so, as the petitioner had prevented the respondent from communicating with either the petitioner or the children. There was also no satisfactory explanation given by the petitioner as to the need to move more than 8,000km away from the respondent (see paras 9–10).

(2) The court was mindful that contempt must be premised on wilful refusal to comply with an order of the court and the petitioner's intention or lack of it, would not negate her conduct which amounted to contempt of

court. In the present case, the petitioner had refused to attend the court's hearing and subsequently applied for adjournment, and then initiated committal proceedings against the respondent. The petitioner then filed an application to be allowed to proceed with the committal application beyond the prescribed timeframe. The court had refused the petitioner's committal application because this application was filed to deliberately delay the hearing of the respondent's application for committal proceedings. In addition, since it was the respondent who had first obtained leave to initiate committal proceedings against the petitioner, the petitioner was not in a position to have any of her applications heard, as she had to first purge her contempt. Since the counsel for the petitioner had finally conceded that the petitioner was in contempt of court, thus, it could not be denied that contempt had been proved beyond reasonable doubt (see paras 11, 14, 16–19 & 23).

(3) The power of the court to punish the petitioner for contempt of court was found in art 126 of the Federal Constitution, and s 13 of the Courts of Judicature Act 1964. In the present case, the petitioner had refused to comply with the court's order since August 2018, and continued to disobey it. Further, the petitioner had wilfully denied the respondent of access to the children, by relocating to a place that made it almost impossible for the respondent to have physical access to the children. Based on the above circumstances, custodial sentence was warranted. The petitioner had applied for some flexibility to return the children and as such, the court had ordered that the petitioner to return the children before 31 January 2023, failing which a custodial sentence would be imposed on her until she purged the contempt (see paras 24–27).

[Bahasa Malaysia summary

Responden dan pempetisyen adalah suami dan isteri sebelum mereka memperoleh dekri nisi di mana hak penjagaan, penjagaan dan kawalan anak-anak mereka diberikan kepada pempetisyen sementara responden diberikan akses. Masalah timbul apabila pempetisyen telah bertindak bertentangan dengan perintah mahkamah dengan menafikan hak akses responden terhadap anak-anak tersebut. Pempetisyen telah melarikan diri ke New Zealand bersama anak-anak tersebut dan mendaftarkan anak-anak tersebut di sebuah sekolah di New Zealand tanpa pengetahuan responden. Ini membawa kepada pemfailan permohonan penghinaan mahkamah menurut A 52 k 4 Kaedah-Kaedah Mahkamah 2012 ('lampiran 58'). Isu-isu yang timbul ialah: (a) sama ada terdapat keengganan dengan sengaja untuk mematuhi perintah tersebut — berkenaan dengan isu ini, pempetisyen berhujah bahawa responden telah gagal membayar nafkah anak, dan akibatnya, pempetisyen tidak mempunyai pilihan selain untuk mencari pekerjaan di New Zealand; dan (b) sama ada hukuman pemenjaraan adalah wajar.

Diputuskan, membenarkan lampiran 58 tanpa perintah berkenaan kos:

(1) Hujahan pempetisyen tidak mempunyai merit atas sebab utama bahawa nafkah dan akses adalah dua isu yang berasingan, dan akses tidak bergantung kepada nafkah. Walau apa pun, responden mendakwa bahawa nafkah tidak dibayar hanya kerana dia tidak dapat berbuat demikian, kerana pempetisyen telah menghalang responden daripada berkomunikasi sama ada dengan pempetisyen atau anak-anak tersebut. Selain itu, tiada penjelasan yang memuaskan diberikan oleh pempetisyen tentang keperluan untuk berpindah lebih daripada 8,000km dari responden (lihat perenggan 9–10).

(2) Mahkamah sedar bahawa penghinaan mesti didasari atas keengganan dengan sengaja untuk mematuhi perintah mahkamah dan sama ada pempetisyen mempunyai niat atau tidak, tidak akan menafikan kelakuannya yang terjumlah kepada penghinaan mahkamah. Dalam kes ini, pempetisyen telah enggan menghadiri perbicaraan mahkamah dan seterusnyanya memohon penangguhan, dan kemudian memulakan prosiding komital terhadap responden. Pempetisyen kemudian memfailkan permohonan untuk dibenarkan meneruskan permohonan komital melebihi tempoh masa yang ditetapkan. Mahkamah telah menolak permohonan komital pempetisyen kerana permohonan ini difailkan untuk sengaja melambatkan pendengaran permohonan responden untuk prosiding komital. Di samping itu, oleh kerana responden yang pertama sekali mendapat kebenaran untuk memulakan prosiding komital terhadap pempetisyen, pempetisyen tidak berada dalam kedudukan untuk didengar dalam mana-mana permohonannya, kerana dia perlu terlebih dahulu menyingkirkan penghinaannya. Oleh kerana peguam bagi pempetisyen akhirnya mengakui bahawa pempetisyen menghina mahkamah, oleh itu, tidak dapat dinafikan bahawa penghinaan telah dibuktikan melampaui keraguan yang munasabah (lihat perenggan 11, 14, 16–19 & 23).

(3) Kuasa mahkamah untuk menghukum pempetisyen kerana menghina mahkamah didapati dalam perkara 126 Perlembagaan Persekutuan, dan s 13 Akta Mahkamah Kehakiman 1964. Dalam kes ini, pempetisyen telah enggan mematuhi perintah mahkamah sejak Ogos 2018, dan berterusan mengingkarinya. Selanjutnya, pempetisyen telah dengan sengaja menafikan responden untuk mendapat akses kepada anak-anak tersebut, dengan berpindah ke tempat yang menjadikan hampir mustahil bagi responden untuk mempunyai akses fizikal kepada anak-anak tersebut. Berdasarkan keadaan di atas, hukuman pemenjaraan adalah wajar. Pempetisyen telah memohon sedikit kelonggaran untuk memulangkan anak-anak tersebut dan oleh itu, mahkamah telah memerintahkan pempetisyen memulangkan anak-anak tersebut sebelum 31 Januari 2023, jika gagal hukuman penjara akan dikenakan ke atasnya

sehingga dia menyingkirkan penghinaan tersebut (lihat perenggan 24–27).]

Cases referred to

Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240; [1997] 3 CLJ Supp 518, HC (folld)
Fairclough & Sons v Manchester Ship Canal Co (No 2) [1897] WN 7, CA (refd)
J v J [2021] 10 MLJ 784, HC (refd)
Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd [2001] 4 MLJ 577, CA (refd)
Lee Chang Yong v Teng Wai Yee [2017] MLJU 1841, HC (folld)
Ravinthiran a/l Manickam v Parameswary a/p Vellayan [2011] MLJU 1517, HC (refd)
Sharmila a/p M Helan Govan v Gunalan a/l Govindasamy & Anor [2020] MLJU 199, HC (refd)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Federal Constitution art 126
Rules of Court 2012 O 52, O 52 r 4

Muralidharan Kalidass (Wong & Kiu) for the petitioner.
Nurulsyima bt Jamaludin (Syima J & Co) for the respondent.

Evrol Mariette Peters J:

INTRODUCTION

[1] This is the respondent husband's application in encl 58 ('this application') pursuant to O 52 r 4 of the Rules of Court 2012 ('the Rules of Court') to cite the petitioner wife for contempt for having breached an order of the court ('the order') dated 30 November 2017.

THE FACTUAL BACKGROUND

[2] Parties were married in September 2009 and were blessed with two sons ('the Children'), born in 2011 and 2013 respectively.

[3] In November 2017, the parties obtained a decree nisi in which custody, care and control of the children were awarded to the petitioner whilst the respondent was granted access.

[4] In February 2022, the respondent obtained leave to proceed with committal proceedings against the petitioner on the premise that she had denied him access to the children.

[5] I allowed this application for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether there was wilful refusal to comply with order

[6] It was undisputed that the petitioner had, from August 2018, prevented and disallowed the respondent from meeting the children. She had even blocked the respondent through telephone and

[7] The petitioner subsequently fled to New Zealand with the children without the respondent's knowledge, and remains there until present day. The petitioner had also enrolled the children in a school in New Zealand without the respondent's knowledge.

[8] The nub of the petitioner's contention was that the respondent had failed to pay child maintenance, and as a result thereof, the petitioner had no choice but to find employment in New Zealand.

[9] I found the petitioner's contention bereft of merit for the main reason that maintenance and access are two separate issues, and access was never conditional upon maintenance. In any event, the respondent had averred that maintenance was not paid simply because he was unable to do so, as the petitioner had prevented the respondent from communicating with either the petitioner or the children.

[10] Furthermore, even if I were to accept that she had to look for work in order to maintain herself and the children, there was no justification for travelling all the way to New Zealand to seek employment, and as a result, deny the respondent of access, pursuant to the order. In fact, when questioned, her counsel was unable to provide a satisfactory explanation for the need for the petitioner to move more than 8,000km away from the respondent.

[11] This court is mindful that contempt must be premised on willful refusal to comply with an order of the court. This is based particularly on the words of Lee Hun Hoe (Borneo) CJ, where, in citing the case of *Fairclough & Sons v Manchester Ship Canal Co (No 2)* [1897] WN 7 in *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, His Lordship had stated that for one litigant to establish that the other is in contempt of court, 'an order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional.'

[12] In my view, however, 'intention' referred to by Lee Hun Hoe (Borneo) CJ in *TO Thomas v Asia Fishing Industry Pte Ltd* was addressed in the context

of clarity and unambiguity of an order of the court. In the present case, the terms of the order, which the petitioner was fully aware of, were crystal clear.

[13] In any event, in *TO Thomas v Asia Fishing Industry Pte Ltd*, it was further stated by Lee Hun Hoe (Borneo) CJ, in the following passage:

> *Intention is of no consequence in the matter of contempt by disobedience to a court order*: *A-G v Walthamstow Urban District Council* [1895] 11 TLR 533. *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190. In particular, Donovan LJ expressed his view clearly in *Re A-G's Application, A-G v Butterworth* [1963] 1 QB 696 in these words:
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> > I conceive the position, however, to be this. *Regina v Odham's Press Ltd* [1957] 1 QB 73 *ex parte A-G* [1956] 3 All ER 494 makes it clear that an *intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere.* (Emphasis added.)

[14] My attention was also brought to the case of *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577 where it was held that 'mens rea is not an ingredient to be proved in contempt proceedings' and that 'the corollary of there being no necessity to prove mens rea is that lack of intention does not prevent an alleged contemnor from being found guilty of contempt'. Thus, the petitioner's intention or lack of it, would not negate her conduct which amounted to contempt of court.

[15] At this juncture, I will have to state that the respondent had been granted leave to initiate committal proceedings in February 2022, and had complied with all the procedural requirements prescribed by O 52 of the Rules of Court 2012.

[16] The hearing was scheduled for 17 July 2022 but was rescheduled to 14 September 2022 due the court's unavailability. However, although it was rescheduled, the petitioner had refused to attend court on the basis that she was still in New Zealand. As such, her counsel pleaded for an adjournment stating that he would advise his client accordingly. The hearing was, therefore, adjourned to 11 November 2022, and since the petitioner had used the excuse of distance to be absent, the direction was for the hearing to be conducted virtually.

[17] Instead of making an effort to comply with the order, or to at least attend court, the petitioner, on the very next day of the rescheduled initial hearing, that is, 15 September 2022, had filed an application in encl 79 for leave to initiate committal proceedings against the respondent, claiming that he had failed to pay maintenance for the children. Although leave was granted,

such leave had lapsed and she then filed an application on 1 November 2022, in encl 80, to be allowed to proceed with the committal application beyond the prescribed timeframe.

[18] I had refused this application to file out of time for the reason that in my view, the petitioner had deliberately delayed the hearing of the committal proceedings in order to file committal proceedings of her own against the respondent. The timing of her refusal to attend court was indicative that she had deliberately delayed the proceedings in order to file committal proceedings against the respondent, which was clearly an afterthought.

[19] Secondly, I took the view that in light of the fact that it was the respondent who had first obtained leave to initiate committal proceedings against the petitioner, the petitioner was not in a position to have any of her applications heard, as she had to first purge her contempt, if at all.

[20] It was crucial to remind all parties that the petitioner's non-compliance with the order had nothing to do with upholding the dignity of this court but had everything to do with the court's power to ensure that the administration of justice shall not be obstructed or prevented.

[21] I drew guidance from the case of *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240; [1997] 3 CLJ Supp 518, where it was stated that the 'Courts must fulfil its responsibilities by passing an appropriate sentence to reflect the extreme seriousness of the instant case, in particular, the respondent's unrelenting interference with due administration of justice and the unmitigated culpability of the respondent as demonstrated in his article. Our courts would not be doing their duties and indeed would be acting against public interest, especially having regard to the facts and circumstances of the instant case, by imposing a mere fine': per Low Hop Bing J (as he then was).

[22] I also found instructive the case of *Lee Chang Yong v Teng Wai Yee* [2017] MLJU 1841, where it was stated:

> The object of the law of contempt is not to protect judges and their dignity *but to protect the rights of the public by ensuring that the administration of justice is not obstructed or prevented.* To constitute contempt of court, there must be some 'act done, or writing published calculated to bring a Court or Judge of the Court into contempt or to lower his authority' or 'calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts'. (Emphasis added.)

[23] Counsel for the petitioner had finally conceded that the petitioner was in contempt of court, as he admitted that the petitioner had no leg to stand on. It was undeniable, therefore, that contempt had been proved beyond a reasonable doubt.

Whether a custodial sentence was warranted

[24] The power of this court to punish the petitioner for contempt of court is found in art 126 of the Federal Constitution, and s 13 of the Courts of Judicature Act 1964, both of which read:

> Federal Constitution
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> Article 126 — Power to punish for contempt
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> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.
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> Courts of Judicature Act 1964
>
> Section 13 — Contempt
>
> The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[25] The respondent contended that circumstances of this case warranted a custodial sentence. I had to agree with the respondent on the authorities of *Sharmila a/p M Helan Govan v Gunalan a/l Govindasamy & Anor* [2020] MLJU 199, *Ravinthiran a/l Manickam v Parameswary a/p Vellayan* [2011] MLJU 1517, and *J v J* [2021] 10 MLJ 784, and based on the following facts, namely, that:

(a) the petitioner had refused to comply with the order since August 2018, and continued to disobey it; and

(b) the petitioner had willfully denied the respondent of access to the children, by relocating to a place that made it almost impossible for the respondent to have physical access to the children.

[26] Since it was undisputed that the petitioner had breached the terms of the order, the petitioner herself had requested for some time to return the children as she had to make the necessary arrangements pertaining to their school. She had also indicated that she would return the children before 31 January 2023.

[27] Since the petitioner had pleaded with this court for some flexibility, my order was for the petitioner to return the children before 31 January 2023, failing which a custodial sentence would be imposed on her until she purged the contempt.

CONCLUSION

[28] In summary, in the interest of justice, and after careful scrutiny and judicious consideration of all the evidence before this court, including

submissions of counsel, this application was allowed, and since the petitioner had agreed to return the children by the prescribed date, there was no order as to costs.

Enclosure 58 allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar